No. 6346

In the United States Circuit Court of Appeals for the Ninth Circuit

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, A CORPORATION, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

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INDEX

CITATIONS

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PREVIOUS OPINION

The only previous opinion in the present case is that of the Board of Tax Appeals (R. 143), which is reported in 16 B. T. A. 1290.

JURISDICTION

The case involves income and profits taxes for the years 1918, 1919, 1920, and 1921 in the respective amounts of $66,147.93, $45,133.14, $22,872.09, and $21,867.40. (R. 31, 70, 109.) This appeal is taken from an order of the Board of Tax Appeals

entered June 29, 1929 (R. 151), and is brought to this court by petition for review filed December 26, 1929 (R. 154), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110.

QUESTIONS PRESENTED

1. Having appealed to the Board of Tax Appeals and admitted that it was the taxpayer prior to the running of the time within which assessment could be made against the San Joaquin Fruit Company, was the respondent estopped to deny that it was the taxpayer after such statute of limitations had run?

2. Having determined that the respondent was not the original taxpayer but a transferee of that company, should the Board of Tax Appeals have retained jurisdiction and determined the respondent's liability as transferee?

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 2. (a) When used in this Act—
>
> (1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.
>
> * * * * *
>
> (9) The term "taxpayer" means any person subject to a tax imposed by this Act.
>
> * * * * *
>
> SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax im-

posed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed * * * shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations * * * as in the case of the taxes imposed by this title * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor

is asserted by the Commissioner at or before the hearing or a rehearing.

SEC. 280 (a) The amounts of the following liabilities shall, except as hereinafter in this section provide, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *:

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

(f) As used in this section, the term "transferee" includes * * * distributee.

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section * * *.

STATEMENT OF FACTS

The San Joaquin Fruit Company, a corporation (hereinafter referred to as the Fruit Company) was organized under the laws of California in 1906 (R. 20, 207), and carried on an agricultural business with headquarters at Tustin, California. (R. 205–206.)

In July, 1922, the respondent, the San Joaquin Fruit & Investment Company (hereinafter referred to as the Investment Company) was organized under the laws of California, with the same charter powers as the Fruit Company, together with certain additional powers, and the village of Tustin, California, was also designated as its principal place of business. (R. 226–229.) It acquired the operating properties of the Fruit Company in exchange for stock (R. 44), and thereafter caused the Fruit Company to distribute its assets and effect a dissolution (R. 209, 214). Formal decree of dissolution was entered by the Superior Court of Orange County, California, on December 26, 1922 (R. 214–223). C. E. Utt, who formerly was president and general manager of the Fruit Company during its entire existence, became president of respondent. (R. 163, 166.)

An examination of the Fruit Company's books was completed November 14, 1921, by a revenue agent, and a copy of the report was left with the Fruit Company. (R. 171.) Apparently another copy of this report was mailed to the Fruit Com-

pany on October 10, 1925. (R. 171–172.) A similar report covering the year 1921 was made December 8, 1925. (R. 193.) Deficiencies in the taxes of the Fruit Company for the years 1918 to 1921, inclusive, were determined. (R. 192–204.) On November 2, 1922, a thirty-day letter setting forth deficiencies for the years 1918, 1919, and 1920, was sent to the Fruit Company (R. 197), and on February 3, 1926, a similar notice covering the year 1921 was mailed to the Fruit Company (R. 192).

The tax was contested on its merits (R. 173), and negotiations were had with the Income Tax Unit (R. 180, 184, 231, 242, 246, 254, 258) with relation to the proposed assessments. Certain concessions and recomputations with respect to the proposed taxes were obtained. (R. 231, 242, 246, 254, 258.) The deficiencies for the years 1918, 1919, and 1920, as finally determined by the Commissioner, were asserted in sixty-day letters mailed to respondent under date of July 21, 1925, and July 27, 1925. (R. 30, 70, 229–231, 232–233.) A deficiency for the year 1921 was asserted in a sixty-day letter mailed to the Fruit Company, care of the Investment Company, under date of September 1, 1926. (R. 109, 171, 234–235.) On September 10, 1925, respondent filed petitions with the Board of Tax Appeals for redetermination of its tax liability for the years 1918, 1919, and 1920 (R. 18, 59), and on October 25, 1926, a similar petition was filed covering the year 1921 (R. 99). These petitions were filed under the caption "San Joaquin Fruit and Investment Co.

(Formerly San Joaquin Fruit Co.)." (R. 18, 59, 99.) Respondent described itself therein as the "taxpayer." (R. 18, 59, 100.) The petitions alleged that respondent was organized in 1906 (R. 20, 61, 101); that it acquired a lease upon real estate in that year (R. 21, 61, 101); that it gained title to the property in 1916 through the exercise of "the taxpayer's" option to purchase (R. 24, 64, 105); and that "the taxpayer is engaged in the cultivation and sale of citrus fruits and nuts" (R. 20, 61, 101) upon land which, during the years 1918 and 1919 "it" owned in fee simple (R. 61). The petitioner therein further alleged that in "its" original return the taxpayer claimed the entire value of said real estate as part of "its" invested capital (R. 24, 64–65, 105), and that "Upon the exercise of said option, and ever since, this taxpayer corporation had had, and is entitled to include in its invested capital" said value (R. 25, 65, 105–106). The petitions concluded with prayers by "the taxpayer" that the Board take jurisdiction and determine its liability. (R. 29, 69, 107.) The first two petitions were signed by "counsel for the taxpayer" and were verified by C. E. Utt, "President of San Joaquin Fruit and Investment Company, a successor to the San Joaquin Fruit Company." (R. 29, 69.) The respondent filed a fourth petition with the Board of Tax Appeals, which related to the tax liability of the Fruit Company for the year 1922. (R. 184–185.) That petition was filed under the caption "San Joaquin Fruit and Investment Company,

successor to San Joaquin Fruit Company, through change of name only."

It was verified by respondent's secretary, who alleged that respondent succeeded the San Joaquin Fruit Company, through change of name only, during the year 1922. (R. 187.) Petitioner joined issue upon said pleadings (R. 35–38, 74–77, 115–117), and thereafter the Board assumed jurisdiction of the cases involving taxes for the years 1918–1921, inclusive, and granted respondent a hearing upon the merits of its appeals. The case was placed upon the trial calendar and set for hearing at the request of respondent. Over objection of petitioner the case was heard as to part of the issues and continued as to other issues. Respondent's counsel announced that he appeared "for the taxpayer," and that the first issue presented related to " 'our' invested capital." (R. 162.) He introduced certain evidence with respect to the merits of the appeal, and then announced that respondent "closed its case with the exception of the special assessment issue." The case was continued to the reserve calendar of the Board to await a certain decision of the United States Supreme Court in a case then pending. (R. 164.) On April 4, 1928, respondent filed motions with the Board for leave to file amended petitions with respect to the years 1918, 1919, and 1920. (R. 38–39, 77–78.) The motions were granted without notice to or knowledge by petitioner. (R. 190–191.) Amended

petitions were thereafter filed, setting forth for the first time that the respondent and the Fruit Company were different corporate entities; that the respondent was not liable for the taxes in question, either as taxpayer or as "transferee." (R. 40–53, 78–91.) On October 10, 1928, a similar amended petition was filed with respect to the year 1921. (R. 117–130.)

On October 16, 1928, respondent's petitions again came on for hearing (R. 164), and respondent was permitted, over the objection of the petitioner, to introduce evidence to show that it was a different legal entity from the San Joaquin Fruit Company (R. 165–173).

In an opinion rendered June 29, 1929 (R. 143), the Board held that as to taxes for the years 1918, 1919, and 1920, the respondent was not liable therefor (R. 148–149) and accordingly entered an order of no deficiency (R. 151). As regards the year 1921 it held that it possessed no jurisdiction for the reason that the party taking the appeal was not the taxpayer against whom liability had been asserted (R. 150–151). The Commissioner of Internal Revenue filed a petition for review. (R. 154.)

While the Commissioner appears to have had waivers covering taxes for the years 1918 and 1919 (R. 169), such waivers were not introduced in evidence and therefore, so far as the record is concerned, it appearing that the statute of limitations had run against the assessment of taxes for those

years at the time the sixty-day letters were issued, the Commissioner raises no question concerning taxes for those years.

SPECIFICATION OF ERRORS

The Board of Tax Appeals erred (R. 157):

1. In not holding that the respondent was estopped to deny that it was the taxpayer and liable for the taxes for the years 1920 and 1921.

2. In deciding that the Commissioner did not determine deficiencies in taxes for the years 1920 and 1921 against the respondent as a transferee under the provisions of Section 280 of the Revenue Act of 1926.

SUMMARY OF ARGUMENT

The respondent, having appealed to the Board of Tax Appeals, and represented in such proceedings that it was the taxpayer, and having raised no issue relative to the sufficiency of the sixty-day letters sent to it with relation to taxes for the years 1920 and 1921 until after the time had expired within which determinations could be made against the Fruit Company, and the case having been tried in part upon the theory that the respondent was liable for the taxes in question, it was estopped to change its position and deny its liability. *Casey* v. *Galli,* 94 U. S. 673, 680; *Morgan* v. *Railroad Co.,* 96 U. S. 716, 720; *Liberty Baking Co.* v. *Heiner,* 34 F. (2d) 513, 516, affirmed (C. C. A. 3d), 37 F. (2d) 703, 704; *Trustees for Ohio & Big Sandy Coal Co.* v.

Commissioner (C. C. A. 4th), 43 F. (2d) 782; *Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268; *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781; *Rockwood* v. *United States* (Ct. Cls.), 38 F. (2d) 707. The jurisdiction of the Board of Tax Appeals having been invoked, it had authority under Sections 283 (b) and 274 (e) of the Revenue Act of 1926, *supra*, to determine the respondent's tax liability, either as the original taxpayer or as transferee, and it became, and was, its duty to do so.

ARGUMENT

I

Respondent is estopped to assert that it is not the taxpayer

It is manifest from the record that subsequent to the merger of the Fruit Company into the Investment Company negotiations were carried on between the Bureau of Internal Revenue and someone representing the taxpayer and that by all concerned the Investment Company was considered and treated as the "taxpayer" and the real party in interest (R. 173, 180, 231, 242, 246, 254, 258), which it clearly was. The notices of deficiency were sent to the Investment Company as though it were the real taxpayer. (R. 229, 232.) On September 10, 1925, appeal was taken to the Board of Tax Appeals in the name of the Investment Company (R. 18, 59), and in the petitions filed therein it was alleged that the respondent was the "taxpayer" (R. 18, 59); that it was organized in

1906 and conducted the business from which the income was derived during the years in question (R. 20, 61); and that it had filed the original returns (R. 24, 64–65). No question was ever raised or even hinted concerning the respondent not being the real taxpayer until December, 1927 (R. 179, 184), more than two years after the petitions had been filed. At the time these petitions were filed the time within which new determinations could be made with respect to taxes for the years 1920 and 1921 had not yet expired. It is submitted that since the respondent held itself out as the taxpayer, accepted the notices of deficiencies, and thereafter affirmatively asserted that such notices had been properly directed to it as the taxpayer, and the Government having been lulled into a sense of security by such action, the respondent ought not, after the time for correcting any errors that might have been made had expired, be permitted to change its position and now assert that it is not the taxpayer. In *Casey* v. *Galli,* 94 U. S. 673, 680, the Supreme Court said:

> Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it.

And in *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, the same Court again said:

> He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief.

This position was urged upon the Board of Tax Appeals (R. 165–173) and it is submitted that in rejecting the Commissioner's contention the Board was in error. Courts will not look with favor upon the respondent's position. See *Universal Steel Co.* v. *Commissioner* (C. C. A. 2d), decided February 9, 1931, reported in Prentice-Hall Fed. Tax Service (1931), Vol. I, p. 760; see also *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner* (C. C. A. 4th), 43 F. (2d) 782, 784–785; *Liberty Baking Co.* v. *Heiner* (C. C. A. 3rd), 37 F. (2d) 703, 704; *Loewer Realty Co.* v. *Anderson* (C. C. A. (2nd), 31 F. (2d) 268; *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781; *Rockwood* v. *United States* (Ct. Cls.), 38 F. (2d) 707.

II

Respondent was clearly liable as "transferee." Having acquired jurisdiction it was the duty of the Board to decide the respondent's tax liability, either as the original taxpayer or as "transferee"

The Board held that the deficiency letter which was sent to the respondent concerning taxes for the

year 1920 asserted a liability of the original taxpayer rather than that of the transferee. It held that the respondent was not the original taxpayer and it thereupon dismissed the petition without attempting to determine respondent's liability as a transferee. (R. 148–149.) As to the year 1921 it held that since the deficiency letter was addressed to the Fruit Company there was no deficiency asserted against the respondent and that since the respondent was not the taxpayer to whom the deficiency notice had been addressed, the Board was without jurisdiction to hear and decide the proceedings, and thereupon dismissed the petition as affecting that year. (R. 150–151.) The petitioner submits that the Board's ruling with respect to each of these two years was erroneous.

Section 274 (a) of the Revenue Act of 1924, *supra,* pursuant to which the notices in the present case were issued, as well as Section 274 (a) of the Revenue Act of 1926, *supra,* merely directs that where the Commissioner determines that there is a deficiency against the taxpayer the taxpayer "shall be notified of such deficiency by registered mail." It will be observed that this statute requires no special form of deficiency but merely requires that the taxpayer shall be notified thereof by mail. Section 280 of the Revenue Act of 1926, *supra,* governs proceedings against transferees but makes no provision whatever for the form of

notice.[1] It merely provides that the liability of the transferee "shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax" imposed against a normal taxpayer. The Board granted the hearing herein to respondent pursuant to the provisions of Section 283 (b) of the Revenue Act of 1926, *supra,* which in part provides:

> If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal.

Having so acquired jurisdiction, under the provisions of Section 274 (e) of the Revenue Act of 1926, *supra,* the Board had jurisdiction to determine the correct amount of the deficiency even though such amount should be greater than the de-

[1] The constitutionality of this section is now being raised in *Anna G. Phillips et al.* v. *Commissioner*, No. 455, now pending in the U. S. Supreme Court. Therein the Circuit Court of Appeals for the Second Circuit sustained its constitutionality (42 F. (2d) 177). A similiar position was taken by the Sixth Ciricuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208. Two District Courts have held to the contrary: *Owensboro Ditcher & Grader Co.* v. *Lucas* (W. D. Ky.), 18 F. (2d) 798; *Mid-Continent Petroleum Corp.* v. *Alexander* (W. D. Okla.), 35 F. (2d) 43. See also *Felland* v. *Wilkinson* (W. D. Wis.), 33 F. (2d) 961, 962.

ficiency stated in the deficiency notice. It is to be further observed that the Board of Tax Appeals was created as an independent agency in the executive branch of the Government. Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

Thus it will be seen that proceedings before the Board of Tax Appeals were never intended to require the strict formality of proceedings in courts of law. As to the deficiency notices no particular form is required. Any form that conveys actual notice is sufficient. It is manifest from the record herein that the respondent was liable for the taxes under consideration as transferee (*Pann* v. *United States* (C. C. A. 9th), 44 F. (2d) 321; *Phillips* v. *Commissioner* (C. C. A. 2nd), 42 F. (2d) 177), and that it fully appreciated this fact and treated the notices as though they were properly directed. There was no reason why such transferee could not waive any defect in the notices rather than raise an issue and cause the proceedings to be instituted anew. See *Tucker* v. *Alexander,* 275 U. S. 228. The case being properly before the Board, it was its duty to treat the action of the taxpayer as a waiver of any defects that may have existed in the notice, and proceed to administer substantial justice, which it clearly had the power to do.

As stated above the statutes merely direct that notice be sent to the "taxpayer." Sections 2 (a) (9) of the Revenue Acts of 1924 and 1926 define the term "taxpayer" as "any person subject to a tax

imposed by this Act," and the Supreme Court has held that the term is broad enough to include "transferee." *United States* v. *Updike,* 281 U. S. 489. It follows that notice to the respondent as "taxpayer" included notice to it as "transferee." It is therefore submitted that the Board of Tax Appeals was not justified in placing a narrower construction upon the statutory requirements as to notice.

This position is not in conflict with the general principal that statutes imposing taxes are to be strictly construed against the Government (*Gould* v. *Gould,* 245 U. S. 151), for we are asking the court to go no further than courts have gone in other cases. For example: It has been held that the term "associations" includes "Massachusetts trusts" (*Hecht* v. *Malley,* 265 U. S. 144, 145); the term "partnership" includes "an unincorporated joint-stock association" (*Burke-Waggoner Oil Ass'n.* v. *Hopkins,* 269 U. S. 110); and a number of persons acting through a common "attorney in fact" constitute an "association" (*Pickering* v. *Alyea-Nichols Co.* (C. C. A. 7th), 21 F. (2d) 501, 506-507).

It is submitted that the action of the Board of Tax Appeals in dismissing the petitions was arbitrary and not warranted in law and should therefore be reversed.

CONCLUSION

It is respectfully submitted that the action of the Board of Tax Appeals should be reversed and

the case remanded with instructions to the Board to redetermine respondent's tax liabilities in accordance with the computation of the Commissioner of Internal Revenue.

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